the conclusion, in the exercise of my discretion, that the applicant should have the custody of the infant. It is relevant to observe that the order for custody made by me would result in the infant living not only with his natural mother but with his natural father as well. No order was made as to costs.

*Application allowed.*

Solicitors:—*R. Ramason*; *Director of Legal Aid.*

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## M. GORE v. D. S. GORE

**[O.C.J. (Gill J.) August 7, 1963]**

**[K.L. — Civil Suit No. 156 of 1963]**

*Family Law —Husband and wife—Separation by mutual consent—Agreement to pay maintenance—Default in monthly payment—Whether enforceable.*

This was a claim for arrears in maintenance pursuant to a written agreement entered into by the parties by mutual consent. The defendant admitted entering into the agreement, but contended that he no longer consented to the plaintiff and the children living apart from him and that the agreement was no longer enforceable.

**Held:** the agreement not having been varied or cancelled by agreement between the parties, and no question of its rectification or cancellation having been raised in the proceedings it was still a valid contract and therefore enforceable by the Court.

MOTION FOR JUDGMENT.

*K. Y. Chan (Miss)* for the plaintiff.

*S. D. K. Peddie* for the defendant.

**Gill J.:** This was a motion for judgment under Order 32 rule 6 of the Rules of the Supreme Court, 1957.

The claim was for $3,000, being the amount due to the plaintiff from the defendant under a written agreement entered into by them on 14th September, 1957 whereby the defendant agreed to pay to the plaintiff the sum of $600 on the 28th day of each month by way of maintenance for herself and the three children of the parties. The amount of $600 a month was paid up to 28th August, 1962, but thereafter default was made in the monthly payments. The claim was for five monthly instalments from 28th September 1962 to 28th February 1963.

In his written statement of defence the defendant admitted entering into the agreement in question by mutual consent but contended that he no longer consented to the plaintiff and the children living apart from him and that in the circumstances the agreement was no longer enforceable. He also contended that one or more of the children were gainfully employed and were therefore no longer in need of maintenance.

It is quite clear that the payment of $600 a month was made under a written agreement which was entered into by the parties by mutual consent. The agreement not having been varied or cancelled by agreement between the parties, it is still a valid contract and therefore enforceable by the Court. So long as the contract is in existence the duty of the Court is to interpret it and not to vary it unless the question of its rectification or cancellation is raised by way of counterclaim or by a separate action.

As there was no counterclaim raised in these proceedings, I felt I had no option but to deal with the agreement as it stood on the date of the motion for judgment. In view of the admission made in the written statement of defence and in view of the fact that regular payments were made under the agreement up to August 1962, I gave judgment for the plaintiff as prayed.

*Judgment for the plaintiff.*

Solicitors:—*Donaldson & Burkinshaw; Skrine & Co.*

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## DENG ANAK EKOM v. REGINA

**[C.A. (Smith, Simpson & McGilligan JJ.) August 16, 1963]**

**[Kuching — Criminal Appeal No. 2 of 1963]**

*Criminal Procedure—Sentence—Age of offender—"If it appears to the Court"—Physical appearance—Assessment of age—Benefit of the doubt—Criminal Procedure Code (Sarawak, Cap. 58), s.219*.*

In assessing the age of an accused under section 219 of the Criminal Procedure Code (Sarawak, Cap. 58) the opinion of the trial judge based on the physical appearance of the accused is a proper matter to be taken into consideration, but not a very reliable guide, unless the person assessing the age has any specialised knowledge of the people or the race to which the accused belongs.

*Case referred to:—*

(1) *Najirullah bin Hajirullah & Anor.* v. *R.* (unreported) Jesselton Criminal Appeal No. 8 of 1961.

COURT OF APPEAL (CRIMINAL).

*T. O. Thomas* for the appellant.

*J. W. Williams* (Deputy Public Prosecutor) for the respondent.

*Cur. Adv. Vult.*

The judgment of the Court was delivered by,

**Smith J.:** The applicant, a young Dayak man, Deng anak Ekom, was convicted of murder by the High Court sitting at Kuching and

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Section 219 of the Sarawak Criminal Procedure Code corresponds to section 256 of Singapore Criminal Procedure Code (Cap. 132). *Cf.* section 16, F.M. Juvenile Courts Ordinance, 1947 as amended.